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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Backpage.com, LLC, et al.,

Defendants.

Case No. 18-CR-00465-SMB

**JOINT MOTION TO
TEMPORARILY CONTINUE
ANCILLARY PROCEEDINGS**

Hon. Susan M. Brnovich
Date: June 21, 2019
Time: 1:30 p.m.

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14 *Shearwater Holdings LLC; and*
Cereus Properties LLC

15
16 The Government and Claimants¹ by and through their respective counsel of record,
17 jointly move this Court for a continuance of ancillary proceedings in this matter. The
18 Parties agree that good cause exists to continue the ancillary proceedings currently set for
19 June 21, 2019, for a period of six months with a status conference on the matters set in five
20 months. However, the parties' rationales and bases for the continuance request differ and
21 are set forth below.

22 BACKGROUND

23 On April 5, 2018, pursuant to a plea agreement, defendants Backpage.com, LLC;
24 Website Technologies, LLC; Posting Solutions, LLC; Amstel River Holdings, LLC; Ad
25 Tech BV; and UGC Tech Group BV (collectively, the "Backpage Defendants"), plead guilty

26
27 ¹ As used herein, "Claimants" refers to Michael Lacey, James Larkin, John Brunst,
28 Scott Spear, Andrew Padilla, Joye Vaught, Medalist Holdings Inc., Leeward Holdings LLC,
Camarillo Holdings LLC, Vermillion Holdings LLC, Shearwater Holdings LLC, and Cereus
Properties LLC.

1 to an Information charging 18 U.S.C. § 1956(h) (money laundering conspiracy). (Dkt. 4).
2 On May 16, 2018, pursuant to Rule 32.2(b), the Court entered a Preliminary Order of
3 Forfeiture (Dkt. 22), which incorporated the list of assets identified in the plea agreement.
4 (*Id.*). On June 29, 2018 (*see* Dkts. 28-33), and July 1, 2018 (*see* Dkts. 35-40), Claimants
5 filed petitions asserting interests in assets listed in the Preliminary Order of Forfeiture.

6 On October 15, 2018, the government filed a “Stipulated Motion to Amend and
7 Supplement Preliminary Order of Forfeiture” (Dkt. 43), to add to the Preliminary Order of
8 Forfeiture funds held in a number of attorney trust accounts for the benefit of and
9 representation of Claimants and others. The Court entered an order granting this motion on
10 October 18, 2018 (Dkt. 44).²

11 On October 19, 2018, this Court entered an order setting a November 16, 2018,
12 hearing on Claimants’ petitions concerning assets listed in the initial Preliminary Order of
13 Forfeiture. On November 7, 2018, Claimants moved for a stay of all ancillary proceedings
14 concerning the originally listed assets and the law firm retainers added by the Government’s
15 amendment (Dkt. 51).³ The Government agreed that a stay was appropriate, albeit for
16 different reasons (Dkt. 59). The Court granted the motion in part by issuing a stay through
17 December 7, 2018 (Dkt. 60).

18 In the meantime, on October 31, 2018, the Government obtained *ex parte* seizure
19 warrants for the attorney retainer funds⁴ in the Central District of California. Claimants
20 challenged the warrants and sought relief in this Court (*United States v. Lacey*, No. CR-18-
21 00422-06-PHX-SPL, Dkts. 360, 365, 376). In a hearing on November 16, 2018, the Court
22 denied Claimants’ motions, directing that the challenges should be brought in the Central
23

24 ² Claimants sought reconsideration of this order, noting that they had no opportunity
25 to respond and raising substantive objections to the motion (Dkt. 45). The government
opposed this request (Dkt. 50), and the Court has not ruled on the request.

26 ³ On November 18 and 19, 2018, Claimants filed petitions asserting their interests in
27 the attorney trust funds that were listed in the Government’s Stipulated Motion to Amend
(Dkts. 61, 62, 64-73).

28 ⁴ Claimants note these are properly referred to as “law firm trust accounts.”

District of California (*see* Dkt. 393). Claimants then filed motions asserting challenges under the First, Fourth, Fifth and Sixth Amendments in that court, which heard argument on December 12, 2018. That court also called for and received supplemental briefing. The matters were fully submitted to the court in January 2019. Claimants' motions remain pending.

Pursuant to a joint motion filed by the parties in this case on November 30, 2018 (Dkt. 74), the Court continued the ancillary proceedings until January 25, 2019 (Dkt. 75).⁵ Pursuant to another joint motion filed by the parties in this case on January 23, 2019 (Dkt. 62), the Court continued the ancillary proceedings until June 21, 2019 (Dkt. 64). More recently, the parties met and conferred regarding their respective positions, and again agreed to move jointly to continue the ancillary proceedings. Now, by this Second Joint Motion, the parties seek to further articulate good cause for this Court to continue the ancillary proceeding for six months, given the circumstance of this case.

While the parties jointly request the continuance, their rationales are different and so are set forth separately here.

GOVERNMENT'S POSITION

A. Ancillary Proceedings Are Treated Like Civil Proceedings

The Ninth Circuit and several other Circuits have long recognized that Section 853(n) ancillary proceedings in the criminal forfeiture context are fundamentally civil in nature and are governed by the rules of civil procedure.⁶ In 2000, "Congress adopted Federal Rule of

⁵ The Court's order encompassed all prior petitions of Claimants for assets that had been listed in the original or amended Preliminary Orders of Forfeiture. (*See* Dkt. 75, listing Dkts. 28-40, 61, 62, and 64-73).

⁶ *See, e.g., United States v. MacInnes*, 223 F. Appr'x 549, 551 (9th Cir. 2007) (stating that a Section 853(n) petition by a person who is not the criminal defendant is civil in nature because the determination should be governed by "the nature of the petitioner, rather than the statute governing the proceeding"); *United States v. McHan*, 345 F.3d 262, 275-76 (4th Cir. 2003) (comparing Section 853(n) proceedings to quiet title actions); *United States v. Alcaraz-Garcia*, 79 F.3d 769, 772 n.4 (9th Cir. 1996) (holding that, under Fed. R. App. P. 4(a)(1), a Section 853(n) petitioner has sixty days to appeal a district court's decision, as opposed to the ten-day time limit applied in criminal cases, because a Section 853(n) proceeding is civil in nature); *United States v. Douglas*, 55 F.3d 584, 586 (11th Cir. 1995)

1 Criminal Procedure 32.2 governing proceedings relating to criminal forfeiture, including
 2 third-party petitions.” *Pacheco v. Serendensky*, 393 F.3d 348, 352 (2nd Cir. 2004) (citing
 3 Fed. R. Crim. P. 32(k)(2)). Rule 32.2 mandates that “when a third party files a petition
 4 asserting an interest in property to be forfeited, the court must conduct an ‘ancillary
 5 proceeding.’” *Id.* (citing Fed. R. Crim. P. 32.2(c)(1)). “That ancillary proceeding, although
 6 occurring in the context of criminal forfeiture, closely resembles a civil action.” *Id.*; *United*
 7 *States v. Moser*, 586 F.3d 1089, 1093 (8th Cir. 2009) (Section 853(n) “carries many of the
 8 hallmarks of a civil proceeding, and it bears few if any hallmarks of a criminal proceeding”);
 9 *see* Fed. R. Crim. P. 32.2(c)(1)(A) & (B).⁷ Thus, under Rule 32.2, a request for stay of a
 10 third-party petition in a criminal forfeiture proceeding prior to discovery or a hearing should
 11 be treated like a motion to stay a civil forfeiture complaint under Federal Rule of Civil
 12 Procedure Rule 62. *See id.* (concerning 12(b) motion to dismiss). Because a stay analysis
 13 with respect to civil forfeiture proceedings is equally applicable to related criminal ancillary
 14 proceedings, the Government sets forth its arguments herein based on such premise.

15
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 17 (“Congress ... viewed a § 853(n) hearing as a species of an ‘action at law or equity’—a
 18 substitute for separate *civil* litigation against the government.”) (quoting 21 U.S.C. §
 19 853(k)(2)); *United States v. Lavin*, 942 F.2d 177, 181-82 (3d Cir. 1991) (same holding as
 20 *Alcaraz-Garcia*); *United States v. D’Esclavelles*, 541 F. Supp. 2d 794, 797 (E.D. Va. 2008)
 21 (granting fees under Section 2465(b)(1) and stating, “The hearing that follows [a Section
 22 853(n) petition] is civil in nature.”), overruled on other grounds by *United States v. Buk*, 314
 23 Fed. App’x 565, 570 (4th Cir. 2009); *United States v. Nolasco*, 2008 WL 4388518, at *2
 24 (D.N.J. Sept. 29, 2008) (“Moving Petitioners correctly characterize their § 853(n) petition
 25 as ‘civil.’”); *United States v. McCollum*, 443 F. Supp. 2d 1154, 1165 (D. Neb. 2006) (stating
 26 in *dicta*, “Although this is a criminal case, the matter before me is quasi-civil in nature and
 27 arises pursuant to 21 U.S.C. § 853(n)”; *United States v. Wade*, 291 F. Supp. 2d 1314, 1316-
 28 17 (M.D. Fla. 2003) (holding that a petitioner is not entitled to effective assistance of counsel
 because Section 853(n) petitions are civil in nature).

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B. Stay Pursuant to 18 U.S.C. § 981(g)(1)

To address the conflicts that may arise from discovery and the possibility of self-incrimination when there are simultaneous criminal and civil proceedings, Congress passed the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”), which provides for a stay of civil forfeiture proceedings that are related to a criminal investigation or prosecution. *See* 18 U.S.C. § 981(g). Specifically, Section 981(g)(1) states:

Upon the motion of the United States, the court shall stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case.

Thus, in order to stay these Ancillary Proceedings pursuant to Section 981(g)(1), this Court need only determine that (1) these proceedings are related to a criminal proceeding or investigation, and (2) any civil discovery will adversely affect the Government’s ability to conduct a related criminal investigation or prosecution in the related criminal matter. *See* 18 U.S.C. § 981(g)(1); *see also United States v. Real Prop. Located at 6415 N. Harrison Ave., Fresno Cty.*, No. 1:11-CV-00304-BAM, 2012 WL 4364076, at *3 (E.D. Cal. Sept. 21, 2012). If the Government satisfies this two-pronged test, “the Court is obligated by the plain language of the statute to grant the Government’s request for a stay.” *6415 N. Harrison Ave.*, 2012 WL 4364076, at *6.

C. The Ancillary Proceeding Is Related To The Criminal Proceeding

Section 981(g)(4) defines the terms “related criminal case” and “related criminal investigation” as follows:

[A]n actual prosecution or investigation in progress at the time at which the request for the stay, or any subsequent motion to lift the stay is made. In determining whether a criminal case or investigation is ‘related’ to a civil forfeiture proceeding, the court shall consider the degree of similarity between the parties, witnesses, facts, and circumstances involved in the two proceedings, without requiring an identity with respect to any one or more factors.

1 18 U.S.C. § 981(g)(4). Courts within the Ninth Circuit have consistently found that
 2 “[w]here common facts, similar criminal offenses, and common parties exist, the criminal
 3 and civil cases are considered to be ‘related.’” *149 G St., Lincoln, Cal.*, 2013 WL 2664770,
 4 at *4; *see One 2008 Audi R8 Coupe*, 866 F. Supp. 2d at 1183; *6415 N. Harrison Ave.*, 2012
 5 WL 4364076, at *3.

6 **D. At This Time, Discovery Will Adversely Affect The Criminal Matter**

7 Section 981(g)(1) does not require the Government to demonstrate a particular
 8 showing of prejudice; the Government need only demonstrate likely or anticipated prejudice
 9 or harm. Section 981(g)(1) “does not require a particularized showing of prejudice or
 10 specific harm as contemplated by [the Individual Defendants].” *Florida Capital Bank*, 2009
 11 WL 3458189 at *2. The only thing this Court “must determine is whether civil discovery
 12 will interfere with the [related] criminal [proceeding].” *Id.* “Courts have routinely issued
 13 Section 981(g)(1) stays on the basis of the Government’s allegations of *likely* prejudice to
 14 the criminal proceeding caused by the civil discovery.” *One 2008 Audi Coupe*, 866 F. Supp.
 15 2d at 1185 (emphasis in original).

16 **E. Proceeding Now With The Ancillary Proceedings Would Burden The**
 17 **Rights Of Certain Individual Claimants In The Related Criminal**
 18 **Investigation Or Case**

19 It is the Government’s general policy to seek to stay related civil proceedings
 20 (including any ancillary proceedings) in order to avoid implicating the rights of individual
 21 criminal defendants in an effort from having to choose between (1) subjecting themselves
 22 to civil discovery and (2) invoking their Fifth Amendment rights. The Government’s policy
 23 is consistent with Section 981(g)(1).

24 Should any related ancillary proceeding be allowed, not only will the Government’s
 25 ability to prosecute this criminal proceeding be impaired, but certain of Claimants’ Fifth
 26 Amendment rights may be violated. This is based on anticipated discovery inherent in such
 27 proceedings. *See United States v. 4Certain Real Prop. & Premises Known as 4003-4005*
 28 *5th Ave., Brooklyn, N.Y.*, 55 F.3d 78, 83 (2nd Cir. 1995) (claimant in a civil forfeiture case

1 faces the dilemma of remaining silent and allowing the forfeiture or testifying against the
2 forfeiture and exposing himself to incriminating admissions).

3 CLAIMANTS' POSITION

4 Under 21 U.S.C. § 853(n), third parties that have filed petitions asserting an interest
5 in property that the government attempts to forfeit from a criminal defendant have a right to
6 an evidentiary hearing. At the hearing, the third party petitioner “may testify and present
7 evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the
8 hearing.” 21 U.S.C. § 853(n)(5). The Government may also “present evidence and
9 witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses
10 who appear at the hearing.” *Id.* “In addition to testimony and evidence presented at the
11 hearing, the court shall consider the relevant portions of the record of the criminal case
12 which resulted in the order of forfeiture.” *Id.* “The hearing shall be held before the court
13 alone, without a jury.” 21 U.S.C. § 853(n)(2).

14 “While the ancillary proceeding is mandatory, nothing in either Rule 32.2(b) or
15 Section 853(n) sets a deadline for when the ancillary proceeding must begin.” Stefan D.
16 Cassella, *Asset Forfeiture Law in the United States* § 23-3, at 660-61 (2007). Section
17 853(n)(4) provides that, “to the extent practicable and consistent with the interests of
18 justice,” the court should hold a hearing on third-party claims within thirty days, but, “[a]s
19 a practical matter, courts seldom resolve third party claims that quickly.” *Id.* § 23-6, at 667.
20 As the statutory language reflects, the thirty-day time frame is not mandatory, and it should
21 not be applied when, as here, the parties collectively agree that going forward with ancillary
22 proceedings at this time is not practicable or in the interests of justice.

23 Ancillary proceedings should be postponed in this case for a number of reasons.⁸
24 First, challenges to the Government’s seizures and efforts to forfeit Claimants’ and other
25 parties’ attorney retainer funds remain pending in the Central District of California, where

26 ⁸ The discussion above focuses on substantive reasons that ancillary proceedings are
27 impractical and inappropriate at this time. But, ancillary proceedings also cannot begin for
28 a separate, procedural reason. As discussed *infra*, the Preliminary Order of Forfeiture upon
which the Government’s notice was based remains subject to a request for reconsideration.

1 this Court directed that Claimants’ constitutional objections under the First, Fourth, Fifth
2 and Sixth Amendments should be heard and decided. *See, e.g., In re Seizure of Up To and*
3 *Including \$10,000 in Bank Funds Held in JP Morgan Chase Account #XXXXXX9285*, No.
4 18-MJ-02875 (C.D. Cal.). Similar issues are pending in a Ninth Circuit appeal regarding
5 other civil forfeiture proceedings commenced by the Government in the Central District of
6 California to seize and forfeit assets of several of the Claimants. *See In re Any and All*
7 *Funds Held in Republic Bank of Arizona Accounts XXXX1889, etc.*, No. 18-56455 (9th Cir.)⁹
8 Ancillary proceedings here should be deferred pending decisions in these cases and as a
9 matter of judicial economy.

10 Second, ancillary proceedings cannot occur until the Court determines “whether the
11 Government has established the requisite nexus between the property [sought to be
12 forfeited] and the offense,” *i.e.*, whether the “property is subject to forfeiture” under the law.
13 Fed. R. Crim. P. 32.2(b)(1); *see also id.* 32.2(b)(5)(B) (same nexus requirement if forfeiture
14 determination is made by a jury). Neither the Government’s claims nor a cooperating
15 defendant’s concession that property is subject to forfeiture can be enough to establish the
16 requisite nexus that funds are, in fact, “tainted” criminal proceeds. The statute requires an
17 independent determination by the Court, and this too is of constitutional import, because
18 parties who hold untainted assets are free to use them as they choose. *See Luis v. United*
19 *States*, 136 S. Ct. 1083, 1091 (2016) (government’s forfeiture of untainted assets violated
20 Sixth Amendment right to counsel of choice; “It is the difference between what is yours and
21 what is mine.”); *see also United States v. Daugerdas*, 892 F.3d 545, 552 (2d Cir. 2018) (due
22 process clause forbids binding claimant to determination in prior proceedings between
23 criminal defendant and the government that property was subject to forfeiture, where
24 claimant “was not permitted to participate”). In this case there has been no determination
25 that *any* of assets the Government seeks to forfeit are criminal proceeds, much less that
26
27

28 ⁹ Briefing has concluded and expedited oral argument is scheduled for July 9, 2019.

1 every dollar of revenue ever earned by Backpage.com – whether for employment ads, real
 2 estate ads, escort ads, or anything else – was known criminal proceeds.¹⁰

3 Third, ancillary proceedings should be stayed pending the outcome of the
 4 proceedings in the Delaware Court of Chancery in *Camarillo Holdings, LLC, et al. v. Amstel*
 5 *River Holdings, LLC, et al.* (C.A. No. 2018-0606-SG). The Chancery Court action relates
 6 to Claimants’ interests in certain assets the Government seeks to forfeit from Backpage.com,
 7 LLC and its affiliates (the attorney trust funds). The central issue in an ancillary hearing—
 8 the parties’ respective interests in forfeited assets—is governed by state law. *See, e.g.,*
 9 *United States v. Hooper*, 229 F.3d 818, 820 (9th Cir. 2000) (“[s]tate law determines whether
 10 Claimants have a property interest”); *United States v. Alcaraz-Garcia*, 79 F.3d 769, 774
 11 (9th Cir. 1996) (“Under 21 U.S.C. § 853(n)(6) the ‘legal right, title or interest’ of the third
 12 party is determined by state law.”). As the pending Delaware case predates the
 13 Government’s efforts to forfeit the attorney trust funds, and also may resolve certain
 14 disputes relating to Claimants’ interests in the attorney trust funds, a stay pending the
 15 resolution of the Delaware action is appropriate.

16 CONCLUSION AND JOINT REQUEST

17 Based on the forgoing, the parties respectfully request that the Court continue the
 18 ancillary proceedings for a period of six months, and set a status conference in this regard
 19 in five months, or at another such date as the Court sets. A Proposed Order is being lodged
 20 contemporaneously with this Amended Joint Motion to Stay.

21 Respectfully submitted this 5th day of June 2019.

22
 23 MICHAEL BAILEY
 24 United States Attorney
 District of Arizona

25
 26 ¹⁰ As set forth in the pending motion to dismiss the Superseding Indictment (*see*
 27 *United States v. Lacey et al.*, 18-CR-00422-PHX-SMB, at Dkt. 561), in making
 28 determinations about whether there is any “nexus” or “taint,” the Government would have
 to show that specific ads related to illegal conduct, that each defendant knew this, but
 nonetheless published each ad, and that each defendant intended and acted to further an
 unlawful business enterprise related to the ads.

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9 Leeward Holdings LLC; Camarillo Holdings

10 LLC; Vermillion Holdings LLC; Shearwater

11 Holdings LLC; and Cereus Properties LLC

Certificate of Service

I hereby certify that on this date, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Backpage.com LLC, et al.

Defendants.

CR-18-00465-PHX-SPL (BSB)

[PROPOSED] ORDER TO
TEMPORARILY CONTINUE
ANCILLARY PROCEEDINGS

Hon. Susan M. Brnovich

Date: June 21, 2019

Time: 1:30 p.m.

Plaintiff United States of America and Claimants¹ by and through their respective counsel of record have applied to this Court for a continuance of ancillary proceedings in this matter for a period of at least four months.

The Court finds the parties have demonstrated sufficient good cause for a further continuance at this time, and the present ancillary proceeding hearing is vacated. A status conference is set for November ____, 2019 at 9:30 a.m.

¹ As used herein, "Claimants" refers to Michael Lacey, James Larkin, John Brunst, Scott Spear, Andrew Padilla, Joye Vaught, Medalist Holdings Incorporated, Leeward Holdings LLC, Camarillo Holdings LLC, Vermillion Holdings LLC, Shearwater Holdings LLC, and Cereus Properties LLC.